

〈특집: 아시아 민주주의 발전에서 헌법재판의 역할〉

Taiwan's Constitutional Court from 2003 to 2011 : New Appointments and Different Performance*

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Abstract

In October 2003, Taiwan's Constitutional Court underwent its first structural change, mainly in the number and term of Justices, since its establishment in 1948. Meanwhile, this new court also faced the first party turnover and divided government in the history of Taiwan. Against the above backdrop, this paper discusses the impact of such structural and political changes on the overall performance of this new court. After a brief review of the development of Taiwan's Constitutional Court under the authoritarian rule (1950s to 1980s), this paper went on to analyze the major reforms during the democratization process of 1990s. Comparing the performance of Taiwan's Constitutional Court before and after 2003, this paper finds the post-2003 court has been a much more active and divided one, due to the above structural change and some personal factors. Moreover, the change toward staggered and individualized terms has triggered an unintended consequence of increasingly partisan appointment process. In terms of career backgrounds of Justices before appointment, this paper also finds that those scholars-turned-Justices, particularly those formerly public law scholars, have been the most outspoken and active Justices in practice.

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1. Introduction

Taiwan's Constitutional Court¹⁾ (hereinafter "CC") is probably the oldest one in Asia. It was formally established in 1948.²⁾ However, it did not function well during the subsequent four decades of authoritarian rule under the Nationalist Party (Kuomintang, hereinafter "KMT") regime. Only beginning from the late 1980s did Taiwan's CC start significant reforms along with the democratization process. Since then, it has gradually established itself as the Guardian of Constitution or Guardian of Human Rights, as claimed by its Grand Justices³⁾ and many constitutional lawyers.⁴⁾ However, its organization had remained largely unchanged until the turn of century, in spite of apparent expansion in its jurisdictions.

In October 2003, a new group of 15 Grand Justices took office under the 1997 Constitutional Amendments. This was the first major structural transformation of

¹⁾ Taiwan's Constitution does not expressly provide for the title and organization of "Constitutional Court" as such. Instead, it mandates that the Judicial Yuan (the highest institution of the judicial branch), via its Grand Justices, shall exercise the power of constitutional interpretation. Taiwan Const. Art. 79, Sec. 2. Until the early 1990s, the Constitutional Court was called the "Council of Grand Justices." Since 1993, the name of "Council of Grand Justices" has no longer been used by Judicial Yuan. For simplicity, this paper uses the title of "Constitutional Court" to refer to the institution of Grand Justices in charge of constitutional interpretation throughout its history, unless otherwise indicated.

²⁾ For a brief history on the establishment of Taiwan's CC, see Tom Ginsburg, *Judicial Review in New Democracies : Constitutional Courts in Asian Cases*, Cambridge : Cambridge University Press, pp.115-17 (2003) David Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, *Washington Law Review* 86 : 523, pp.544-45 (2011).

³⁾ See, e.g., Yueh-Shen Weng, *Guardian of Constitution : Reflection and Prospect*, In *Administrative law and the Judiciary of the Rechtsstaat*, Taipei : Angle, pp.390-410 (1994) (original in Mandarin) (calling the Constitutional Court the "Guardian of Constitution"); Yueh-Shen Weng, *Guardian of Constitution : Reflection and Expectation*, In Fort Fu-Te Liao (ed.), *The Theory and Practice of Constitutional Interpretations*, Taipei : Academia Sinica, pp.1-169 (2009) (original in Mandarin). Prof. Weng was a former president of Judicial Yuan and the longest-serving Grand Justice in the history of Taiwan's CC.

⁴⁾ See, e.g., Chien-liang Lee, *Reflection on the Sixty Anniversary of the Guardian of Human Rights and its Contemporary Challenges*, In : Liao, *supra* note 3, pp.467-534 (original in Mandarin).

Taiwan's CC since its creation in 1948. The 1997 Constitutional Amendments, among other revisions, reduced the number of CC Justices from 17 to 15 and their term from 9 to 8 years. This new court was also the first one to be appointed after Taiwan's first party turnover in May 2000. For the first time in history, Taiwan's CC had to face many potential challenges posted by a divided government from 2000 to 2008, with the KMT still in firm control of the Legislative Yuan (LY) opposing the twice-elected President of DPP (Democratic Progressive Party). After both legislative and presidential elections held in early 2008, this new CC experienced the second party turnover, which produced a united government under the KMT again.

Against this backdrop, this paper intends to review the impact of the CC's structural reorganization in 2003 on its performance from 2003 to 2011. In section two, this paper will first give a brief analysis of Taiwan's CC from 1948 to the mid-1980s, before democratization began. In section three, this paper will analyze the major reforms of the CC in the 1990s. In section four, this paper will review the overall performance of the newly reconstructed CC from 2003 to 2011. In conclusion, this paper would argue that this new CC was a much more active and divided court than any of its predecessor, due to a number of structural and personal factors. Meanwhile, as the appointment process of CC has become increasingly partisan, Taiwan's CC is doomed to be trapped in more politicized dilemmas in the future.

2. Taiwan's Constitutional Court before Democratization (1948-1987)

2.1. History of Taiwan's CC

Before discussing Taiwan's CC, a brief introduction of the historical and legal relations between Taiwan and China is needed for background understanding. From 1895 to 1945, Taiwan was a colony of Japan. In October 1945, the then Chinese (Republic of China, ROC) government took control of Taiwan from defeated Japan under the authorization of the General Order no. 1 issued by Douglas Mac Arthur as the Supreme Commander for the Allied Powers on September 2,

1945.⁵⁾ Since then, Taiwan has been *de facto* administered by the ROC government, pending its undetermined international legal status.

Not surprisingly, Taiwan's Constitution was officially promulgated on January 1, 1947 in China, instead of Taiwan. This Constitution took effect in December 1947 and was applied to Taiwan as well. Two years later, this Constitution lost its territory of original application, as a result of the overthrow of the KMT/ROC government by the CCP/PRC (Chinese Communist Party/People's Republic of China) government. Nevertheless, this short-lived Chinese Constitution (hereinafter "1947 Constitution") has gradually evolved to become the Taiwanese Constitution since 1949.⁶⁾

Taiwan's CC (initially called "Council of Grand Justices") was first formed in China. On July 26, 1948, the First-Term Grand Justices took office and then held their first meeting on September 15 of the same year. On January 6, 1949, the Council of Grand Justices issued its first constitutional interpretation in China.⁷⁾

In this sense, Taiwan's CC was indeed a foreign product upon its birth. It originated from the post-war China. Then it was re-established in Taiwan, after the KMT government was ousted by the CCP in China in late 1949. While operating in China, the Council of Grand Justices issued only two constitutional interpretations. The rest of its decisions⁸⁾ were rendered in Taiwan after 1950. In spite of its Chinese origin, this Council of Grand Justices, nevertheless, should be considered a local specialty of Taiwan in that it has helped shape and become a core element of the constitutional development of Taiwan over the past six decades.

2.2. Model of Taiwan's CC : Centralized and Abstract Review

Unlike the U.S. constitution, the 1947 Constitution expressly provides for

⁵⁾ For the text of this order, see <http://www.taiwandocuments.org/surrender05.htm> (last visited Nov. 6, 2011).

⁶⁾ For a brief introduction of Taiwan's post-war constitutional history, see Jau-Yuan Hwang, *Constitutional Change and Political Transition in Taiwan since 1986 : The Role of Legal Institutions*, Unpublished S.J.D. Dissertation, Harvard Law School, pp.16-71 (1995) Ginsburg, *supra* note 2, at 111-15.

⁷⁾ See Lee, *supra* note 4, at 469.

⁸⁾ As of May 2012, there have been a total of 698 Interpretations issued by the CC.

constitutional review (called “constitutional interpretation”) and vested this power in the Judicial Yuan. Any law, ordinance, regulation or rule that is in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a law is in conflict with the constitution, it shall be petitioned to the Judicial Yuan for interpretation.⁹⁾

In practice, Taiwan's CC has been exercising the power of centralized and abstract review. Before the promulgation of Taiwan's Constitution in 1947, the only written constitution adopting the model of centralized and abstract judicial review was probably that of Austria, which re-enacted its pre-WWII Constitutional Court by its *Verfassungsurberleitungsgesetz* of May 1, 1945. On the other hand, the US Supreme Court had been exercising the powers of decentralized and concrete judicial review since 1803, when *Marbury v. Madison* was decided. It has been suggested that the framers of 1947 Constitution did look to the Supreme Court of the United States as the model of constitutional review. Some constitutional scholars of Taiwan argued that the framers' original intent was to establish a U.S. style of Supreme Court to exercise the decentralized and concrete model of judicial review. In spite of such academic debates,¹⁰⁾ in practice the Council of Grand Justices, a special court separate from ordinary courts, was instituted within the Judicial Yuan to exercise the centralized power of constitutional review.

From 1948 to 1991, Taiwan's CC had jurisdictions over the following two matters : (1) interpretation of constitution (constitutional review) and (2) unified interpretation of statutes and regulations.¹¹⁾ In 1992, the third jurisdiction, *i.e.*, “dissolution of political parties found in violation of the constitution, was added by the 1992 Constitutional Amendments. In 2005, the fourth power over the “impeachment of the President and Vice President” was further included as a

⁹⁾ See Taiwan Const. Art. 78, 171 & 172.

¹⁰⁾ For a brief discussion of this controversy, see Ginsburg, *supra* note 2, at 115-17; Law & Chang, *supra* note 2, at 544-45.

¹¹⁾ See Taiwan Const. Art. 78. For the jurisdictions of the Council of Grand Justices before 1993, see Articles 3 & 4 of The Act on the Council of Grand Justices of Judicial Yuan (July 1958). This Act was revised by and renamed as Act of Procedures of Grand Justices of Judicial Yuan of 1993 (hereinafter “Constitutional Interpretation Procedure Act”).

result of the 2005 Constitutional Amendments. The first two categories of cases are handled through plenary meetings of Grand Justices, without public hearings in most cases. The third and fourth categories are to be adjudicated by formal court proceedings, though no such case has ever occurred. For the purpose of this paper, only the first power of constitutional interpretation will be discussed in details.¹²⁾

Both the government agencies (the highest organs at either central or local levels) and private individuals may petition to the CC for constitutional interpretations. In practice, Taiwan's CC has exercised the power of abstract review in most cases, particularly on those petitioned by the individuals. The individuals may petition to the CC only after exhausting the ordinary legal remedies. When petitioning to the CC, they could not ask the CC to revoke the specific court decision concerned. They may only ask the CC to decide whether the laws (statutes and/or regulations) applied in a specific court decision are unconstitutional or not. If so declared, the winning individual petitioner must bring his or her case back to the ordinary court (either Supreme Court or Supreme Administrative Court) for a retrial to revoke the already-final court decision. In this sense, there has been no such "constitutional complaint" (*Verfassungsbeschwerde*) in Taiwan as existed in the jurisdictions of the German Federal Constitutional Court.

2.3. Organization of Taiwan's CC from 1948-2003

Until 2003, Taiwan's CC consisted of 17 Grand Justices. They served a renewable, fixed term of 9 years. Several of them once served for more than thirty years. All of Grand Justices were to be nominated by the President and confirmed by the national legislature. Before May 1992, Grand Justices were to be confirmed by the Control Yuan (the equivalent of Ombudsmen). From May 1992 to April 2000, Grand Justices were confirmed by the National Assembly. Since May 2000, nominees for Grand Justices have to be confirmed by the Legislative Yuan (LY).¹³⁾

¹²⁾ See generally Ginsburg, *supra* note 2, at 123-24.

¹³⁾ Taiwan Const. art. 78 & 79; Additional Article (Const. Amend.) 6 (1991, last amended 2005).

2.4. Overall Performance of Taiwan's CC before Democratization

During Taiwan's martial rule era (December 1949 to July 1987), its CC's performance did not live up to the normative expectation at all. It could be fairly described as mere instrument of authoritarian state. As Table 1 indicates, either the total numbers of decisions (called "Judicial Yuan Interpretations," "JY Interpretations") or of those decisions declaring laws unconstitutional were very low before 1985. The actual function of CC was diminished to a paper-thin symbol.

Since democratization began in the late 1980s, the CC has gradually strengthened its functions. The number of interpretations increased more than threefold after 1985. The number and percentage of interpretations declaring laws unconstitutional also surged. During the past two decades, Taiwan's CC has struggled to evolve into a more independent and competent court of constitutional review.

<Table 1> Numbers of Interpretations Issued by Taiwan's CC from 1948 to 2011

Terms	Years	Total No. of Petitions	Total No. of Interpretations	Average No. of Interpretations Per Year	No. (%) of Interpretations Declaring Laws Unconstitutional
I	10.1948-09.1958	658	79	7.9	0 (0%)
II	10.1958-09.1967	355	43	4.8	1 (2%)
III	10.1967-09.1976	446	24	2.7	0 (0%)
IV	10.1976-09.1985	1145	53	5.9	3 (6%)
V	10.1985-09.1994	2702	167	18.6	39 (23%)
VI	10.1994-09.2003	2334	200	22.2	69 (35%)
	10.2003-09.2011	3350	124	15.5	61 (49.2%)

Source : Official website of the Judicial Yuan, <http://www.judicial.gov.tw/constitutionalcourt/p03.asp> ; the numbers related to the CC of 2003-2011 were collected elsewhere and computed by the author.

3. Reforms of Taiwan's CC in the 1990s

Beginning from the mid-1980s, Taiwan's CC began to define the binding forces of its own interpretations, particularly on the cases petitioned by individuals against the final decisions of Supreme Court and Supreme Administrative Court.¹⁴⁾ As constrained by then-applicable Act on the Council of Grand Justices of Judicial Yuan, Taiwan's CC could not review and vacate any court decision directly. Instead, it may only rule on the constitutionality of the laws applied in the court decisions concerned. If a statute or regulation is found unconstitutional, then the petitioner must apply to the court of final instance (either Supreme Court or Supreme Administrative Court) for a retrial or extraordinary appeal. In the early 1980s, both Supreme Court and (Supreme) Administrative Court once refused to allow such extraordinary remedies even after the CC declared unconstitutional the laws in question. Through its own Interpretations, Taiwan's CC painstakingly forced both courts of final instance to accept its authority on the constitutional issues and to allow such extraordinary remedies. By and large, the CC developed a normative framework of binding forces for its own interpretations in the 1980s. As a result, not only the administrative agencies and legislative assemblies but any court must abide by the relevant constitutional interpretations of the CC, when applying the statutes and regulations in any particular case.

After establishing itself as the highest authority on constitutional issues, Taiwan's CC, in the 1990s, further expanded its jurisdictions with the help of legislative and constitutional amendments, along with its own interpretations.

3.1. Petition by the Legislative Minority : Constitutional Interpretation Procedure Act of 1993

The first major statutory reform came in 1993. In January 1993, Taiwan's parliament, the LY, enacted a new statute, "Constitutional Interpretation Procedure Act" (CIPA), to expand the CC's jurisdictions. This new law enlarged the CC's

¹⁴⁾ See JY Interpretations No. 177, 183, 185, 188, 193 & 209.

jurisdictions by allowing the minority (one-third) members of the LY and the two courts of final instance (*i.e.* Supreme Court and Administrative Court) to petition for the constitutional interpretation.¹⁵⁾

Consequently, the minority members of the LY began to take advantage of this new law and filed a number of petitions on issues of constitutional and political significance. Among the 386 interpretations (No. 313-698) rendered after the enactment of the CIPA and until March 2012, a total of 28 (7.3%) were initially petitioned by the LY minority.¹⁶⁾ This number and percentage may not appear so striking. However, it is the issues involved that made this new petition procedure crucial for Taiwan's democratic transition and consolidation after the 1990s. For example, both Interpretations No. 387 and 419, regarding the timing of cabinet reshuffle (or Premier's resignation) after the elections of parliament and president, respectively, were petitioned by the then minority members of the LY. Interpretation No. 499, which declared the 1999 Constitutional Amendments unconstitutional, was also petitioned by the LY minority. The first injunctive order by the CC to suspend the implementation of a nationwide mandatory fingerprinting program upon issuance of new national IDs was brought about by the LY minority, as well. Many more interpretations of significance were initiated by the LY minority. In spite of these positive impacts, this new procedure also, from time to time, dragged the CC into many fierce political fights between the ruling majority and political minority.

3.2. Petitions by the Judges : Interpretation No. 371

Two years after enactment of the 1993 CIPA, one of its provisions was declared unconstitutional by the CC. In Interpretation No. 371 of January 1995, the CC

¹⁵⁾ Another major revision was the lowering of quorum and voting threshold. In the previous law, adoption of any constitutional interpretation required a three-fourths majority of the total number of Grand Justices present at a meeting and a three-fourths majority of the present Grand Justices voting in favor. This new law of 1993 lowered both quorum and voting threshold from three-fourths to two-thirds.

¹⁶⁾ These 28 Interpretations are No. 325, 329, 342 (by the 5th Term), 380, 387, 388, 392, 401, 419, 421, 426, 436, 450, 461, 463, 467, 472, 481, 485, 499, 543 (by the 6th Term), 585, 599, 601, 603, 632, 633 & 645 (2003-2011).

found unconstitutional a provision of CIPA that allowed only the Supreme Court and (Supreme) Administrative Court to file constitutional petitions. Modeled after the practice (konkrete Normenkontrolle) of German Constitutional Court, Taiwan's CC, by its own decision, created a new type of petition allowing all judges at all levels of court to petition to the CC during the litigation process. By this procedure, if the presiding judges were convinced that the applicable laws in a pending litigation be unconstitutional, then the judges may/shall suspend the litigation and refer the laws in question to the CC for determination of their constitutionality.

3.3. New Structure and Appointment Process : The 1997 Constitutional Amendments

Though the jurisdictions and petition procedures of the CC have undergone some reforms in the 1990s, its organization had remained unchanged since 1948. Only until 1997 did the organization of CC take a new shape as a result of the 1997 constitutional amendments, which also formally reshaped the central government into a semi-presidential system.

The 1997 Constitutional Amendments changed the structure and appointment process of CC, effective from October 2003 upon the end of the sixth term. From 1948 to 2003, the number of Grand Justices was 17. Each Grand Justice served a renewable fixed term of 9 years. Beginning from October 2003, the new CC shall consist of 15 Grand Justices, each of whom will serve a staggered, non-renewable term of eight years. Either eight or seven Grand Justices are to be replaced every four years, as originally provided for in the 1997 Constitutional Amendments.¹⁷⁾

3.4. Attempted Transition towards a U.S. Style of Supreme Court : The 1999 National Judicial Conference

In July 1999, the government-sponsored National Judicial Conference reached a consensus on the future status of CC. This consensus proposed to transform the CC into a US style of Supreme Court, which will be the only final and highest

¹⁷⁾ See Taiwan Const. Additional Article 6, Sec. 1-3.

court on all types of cases, by the end of 2011. Although the CC itself once formally endorsed this proposal in JY Interpretation No. 530 of Oct. 2011,¹⁸⁾ relevant reform bills have been boycotted and stalled by the majority party (KMT) of the LY. In mid-2011, even the Judicial Yuan itself was reportedly prepared to give up this plan.¹⁹⁾ Without too much exaggeration, this proposal is practically dead.

4. The New CC after 2003

The 1997 Constitutional Amendments did not touch upon the jurisdictions of the CC. They only transformed its organization and appointment process. In the following, this paper will evaluate the impact of such structural changes on the performance of the CC after 2003, by comparing it with the sixth term of CC (1994 to 2003).

4.1. A More Politicized Appointment Process : The Unintended Consequence of Staggered Terms

The 1997 Constitutional Amendments changed the terms of Grand Justices from a renewable nine-year term to a non-renewable eight-year one. The 15 Grand Justices appointed in 2003 were the first CC organized under this amendment. One of the original intents of this Amendment was to prevent all Grand Justices from being nominated by a single President and confirmed by the same LY. So the undue political influence associated with the traditional appointment process could be reduced. The second purpose was aimed at a more orderly passing-on of legacy or experiences every four years.

¹⁸⁾ For detailed discussion of the consensus of National Judicial Conference of 1999 and Interpretation No. 530, *see, e.g.*, Jau-Yuan Hwang, Institutional Choice of Judicial Review and the Status of Judicial Yuan, *National Taiwan University Law Journal*, 32(2): pp.55-118 (2003) (in Mandarin).

¹⁹⁾ This new position was reported to be taken by the vice president of Judicial Yuan while sitting as the chairman of an ad hoc committee on judicial reform, convened by the Judicial Yuan. *See* <http://www.judicial.gov.tw/revolution/judReform02.asp> (last visited December 25, 2011).

However, this original design of staggered terms soon lost its well-intended due order after 2007. When the four-year term of first eight Grand Justices appointed in 2003 came to an end in 2007, the then DPP president Chen nominated eight candidates to fill the vacancies. However, four out of eight nominees were defeated solely for partisan reasons by the KMT-controlled LY. These four vacancies were not replaced until September 2008, only after a new KMT President took office and acquired the nomination power. In 2010, two Grand Justices (being the president and vice president of Judicial Yuan at the same time) resigned to take the blame for a series of lower courts' scandals. Both of them were immediately replaced with two new appointees. As a result of the above irregular replacements, the terms of the current 15 sitting Grand Justices would expire in a very scattered and not orderly staggered manner in the future : four in 2015, five in 2016, two in 2018 and four in 2019. While the President of 2012-16 will nominate only four Grand Justices, the President of 2016-20 will have the opportunity to nominate eleven, as many as so done by the current President of 2008-12. By the same token, if more Justices happen to leave office earlier than their eight-year term for whatever reasons, the terms of 15 Justices would become more scattered, leaning towards an individualized pattern.

Compared to the previous appointment process, the current mechanism is so designed to achieve two major purposes: passing-on of experience and reduction of partisan nominations. As to the first goal of passing on the experiences, the practice between 2007 and 2011 has indicated an unintended consequence : decrease in efficiency (in terms of the overall number of interpretations issued). As stated above, from 2007 on there has been changeover of Grand Justices every year except 2009. Whenever there are more than two new Justices replacing the old ones, the overall efficiency of the CC tends to be reduced.

As to the second purpose to reduce the partisan nominations, the new appointment process is supposed to prevent all of 15 Justices being nominated by a single President upon expiration of their terms. Nevertheless, the current design failed to restrain the LY majority from producing an even more partisan CC. Without any constraint, the LY could still produce a partisan CC, merely by defeating those candidates suspicious of being sympathetic with the other political

camp (*i.e.* the minority). In practice, the LY has actually become much more politicized when confirming Grand Justices nominated by the President belonging to the other party, as the case of confirmation process in 2007 clearly indicated.

In the case of the U.S. Supreme Court, replacement of Justices usually occurs one after another, with many years going by in between. It is rare, if ever, to have more than two Justices replaced at the same time. So tipping the political balance toward either direction would occur in a much slowly and subtle manner over years. In Taiwan's case, given the relatively short term of eight years and frequent changeover, the current appointment process of Grand Justices might in fact induce the President to pack the CC with more partisan candidates than before.

In the years of 1994 and 2003, respectively, both of then Presidents Lee Teng-hui and Chen Shui-bian had a much wider discretion to nominate 17 and 15 Grand Justices. Given the larger number of nominees, both Presidents did produce quite balanced lists of candidates, representing a diverse spectrum of political ideologies. In each occasion, each President was able to get all of their nominees (except one in 1994) confirmed by the LY, which also exercised its power in a prudent way. Even the eight-candidate list proposed by President Chen in 2007 was a politically balanced one, though half of them were defeated by the LY out of political hostility. Since 2008, as the number of nominees shrank to five in 2008, two in 2010 and four in 2011, respectively, the current KMT President has picked his nominees based more on political loyalty than professional ability, partly because the LY has been overwhelmingly dominated by the KMT.

The experience of Taiwan suggests : When the number of candidates are larger enough, the President tends to produce a more politically balanced list of candidates. When the number of candidates decreases, the President is tempted to pick his or her own followers. The other important factor is the type of government being unified or divided. In the former case, the President would be induced to produce a list of followers, as well. In the latter case, a more prudent exercise of nomination power by the President usually leads to a more balanced and diverse list. If the above analysis is sustainable, the design of staggered terms might, in certain scenarios, increase, rather than decrease, the politicization of appointment process of Grand Justices in Taiwan in the long run, contrary to the

original intent of the 1997 Constitutional Amendments.

<Table 2> Degree of Politicization of the Appointment Process

	Unified Government	Divided Government
Larger Number of Candidates (Unified Term)	Tolerant List, Featuring a Token or Limited Percentage of Opposition Figures (pre-2000)	Most Balanced List, Representing a Wide Spectrum of Ideological Positions (2000-2008)
Smaller Number of Candidates (Staggered or Individualized Terms)	Most Politicized List, Political Loyalty Prevails (2008-2011)	More Neutral Picks (yet to see)

4.2. A New Composition of CC : Academics v. Career Judges

Following the structural change, the composition of Taiwan's CC also had a different appearance after 2003. The Organization Act of the Judicial Yuan provides for five categories of people eligible for appointment as Grand Justices. Each category is supposed to compose no more than one-third (*i.e.* five Grand Justices) of the CC. These five categories are : people (1) having served as a justice of Supreme Court for more than ten years with a distinguished record; (2) having served as a member of Legislative Yuan for more than nine years with a distinguished record; (3) having been a full professor of a major field of law at a university for more than ten years and having authored publications in a specialized field; (4) having served on the International Court of Justice, or having published authoritative works in the fields of public or comparative law; and (5) being a person highly reputed in the field of legal research and having political experience.²⁰⁾

In practice, application of these five categories has been quite flexible. Some unwritten factors may outweigh the above five categories. Before democratization

²⁰⁾ For English translation of these provisions and more discussions, see Ginsburg, *supra* note 2, at 120-23; Law & Chang, *supra* note 2, at 545-46.

(i.e. before the appointment of the sixth term in 1994), the place of birth was once a key consideration so that the entire group of Grand Justices could “represent” each of the major sub-regions or provinces of China. As a result, the number of Grand Justices chosen from native Taiwanese was limited to three at most then. Balance among different government authorities, e.g., the military, LY, Control Yuan, Justice Department and even the KMT, was also a significant element. The offices of Grand Justices were once distributed to the various sectors of the authoritarian regime as rewards for their loyalty.²¹⁾

Beginning from 1994, a new composition has emerged. Neither the place of birth nor the political affiliation would be a legitimate factor. On the contrary, legal professionals of distinguished achievements have been dominating the pool of candidates. Thanks to the flexible interpretation of the above five categories,²²⁾ career judges and academics have become the two largest sources of candidates for Grand Justices.

From 1994 on, the percentage of academics appointed as Grand Justices has steadily increased. Among the 16 Grand Justices of the fifth term (1985-1994) (with one vacant seat), only five (less than one-third) were formerly scholars.²³⁾ Among the 16 Grand Justices of the sixth term (1994-2003) (with one vacancy), nine (56%) were formerly scholars.²⁴⁾ Among the 15 Grand Justices of the post-2003 CC, eight (53%) or nine (60%) were formerly scholars.²⁵⁾ Above all,

²¹⁾ For a similar discussion on this issue, see Ginsburg, *supra* note 2, at 121-23.

²²⁾ For example, in 2003, a public law scholar and a career judge of Supreme Administrative Court were nominated under the category of “(5) being a person highly reputed in the field of legal research and having political experience.” Category (2) (“having served as a member of the Legislative Yuan for more than nine years with a distinguished record”) has not been cited since 1994.

²³⁾ They were : Tieh-Cheng Liu, Herbert Han-Pao Ma, Yueh-Sheng Weng, Geng Wu and Zu-Zan Yang. See http://www.judicial.gov.tw/constitutionalcourt/en/p01_04.asp (last visited May 4, 2012).

²⁴⁾ They were : Yueh-Sheng Weng, Tieh-Cheng Lu, Geng Wu, Tze-Chien Wang, Vincent Wen-sheng Sze, Chung-Mo Cheng, Hsiang-Fei Tung, Tong-Schung Tai and Jyun-Hsiung Su. Justices Weng and Cheng were later appointed to be the president and vice president of Judicial Yuan in February 1999. Both were replaced by two formerly scholars, In-Jaw Lai and Yueh-Chin Hwang. See http://www.judicial.gov.tw/constitutionalcourt/en/p01_04.asp (last visited May 4, 2012). Cf. Ginsburg, *supra* note 2, at 121 (counting In-Jaw Lai as formerly government official).

the number of public law scholars (including constitutional and administrative laws) also increased from two in the fifth term, to four in the sixth term, and then to five in 2003. From November 2010 to September 2011, seven out of the nine Grand Justices with academic background were formerly public law scholars, which accounted for nearly a half of sitting CC Justices.

On the surface, the bipartite composition (academia and career judges) of CC appeared similar before and after 2003. However, it is the age and generation that would distinct one from the other. Before 2003, most of Grand Justices were appointed at the ages on both sides of 60, often approaching their retirement. Since 2003, at least one-third of Justices took office at the ages around 50 and still in their peak of career, either as academics or career judges. This group of younger generation of Grand Justices proved to be the key element differentiating the two CCs before and after 2003, particularly in terms of active judicial opinions.

4.3. Impact of Formerly Public-Law Academics on the Divergence of Opinions

The most striking difference between the two CCs before and after 2003 should be the degree of divergence among the Grand Justices in their opinions.

As Table 3 below illustrates, the numbers of concurring and dissenting opinions issued by individual Grand Justices have increased steadily since democratization. During the early period of democratization from 1985 to 1994 (the fifth term of CC), a total of 134 concurring or dissenting opinions were issued or joined by individual Grand Justices, averaging only 0.81 piece per decision. As democratization moved on, the total number of individual opinions increased to 214 during the period of 1994 to 2003, averaging 1.07 per decision. After the first party turnover in 2000, the total

²⁵⁾ From October 2003 to September 2007, eight out of 15 Grand Justices were formerly academics. They were : Yueh-Sheng Weng, Chung-Mo Cheng, Tzong-Li Hsu, Yu-Hsiu Hsu, In-Jaw Lai, Yih-Nan Liaw, Tzu-Yi Lin and Syue-Ming Yu. After several replacements, as of September 2011, nine out of 15 Grand Justices were formerly scholars. They were : Chun-Sheng Chen, Ming Chen, Shin-Min Chen, Tzong-Li Hsu, Yu-Hsiu Hsu, Mao-Zong Huang, Chen-Shan Li, Tzu-Yi Lin and Yeong-Chin Su. See http://www.judicial.gov.tw/constitutionalcourt/en/p01_04.asp (last visited May 4, 2012).

number further increased to 309, averaging 2.49 per decision, between 2003 and 2011.

<Table 3> Numbers & Background of Grand Justices Issuing Individual Opinions

Types	Oct 1985-Sep 1994 (16 Justices)			Oct 1994-Sep 2003 (16 Justices)			Oct 2003-Sep 2011 (15 Justices)		
Background	J (11)	S(5)		J (7)	S(9)		J (7)	S(8)	
		PL (2)	NPL(3)		PL (4)	NPL (5)		PL (5)	NPL (3)
Concur.	4	2	2	38	9	28	53	80	60
C&D in part	3	1	1	5	0	1	8	6	10
Dissent. ²⁶⁾	86	11	24	50	18	65	27	42	23
Subtotal	93	14	27	93	27	94	88	128	93
		41			121			221	
Total No. of Justices Issuing Opinions ²⁷⁾	134			214			309		
Total No. of Interpretations	166			200			124		
Average no. / Per Interpretation	0.81			1.07			2.49		

Note :

J : Formerly career judges (also including prosecutors and private attorneys)

S : Formerly scholars

PL : Public Law (scholars)

NPL : Non-Public Law (scholars)

C&D in part : Concurring in part and dissenting in part

Source : Official website of the Judicial Yuan,

<http://www.judicial.gov.tw/constitutionalcourt/p03.asp> ; computed by the author

²⁶⁾ Before 2003, many dissenting opinions were actually concurring opinions (concurring in outcomes while differing in reasons only). Some Justices would issue dissenting opinions simply because they did not fully agree on the reasons, even if they did support the conclusions of Interpretation concerned. That explains why the numbers of dissenting opinions before 2003 are much higher than that after 2003.

²⁷⁾ The number of individual opinions is computed based on the number of Justices issuing or joining such opinions. For example, if a concurring opinion is joined by two Justices, it would count as two, instead of one.

In terms of the frequency of individual opinions, as Table 4 below indicates, in about a half (50.5%) of the total interpretations from 1994 to 2003, there was at least one Grand Justice issuing his or her individual opinion. From 2003 to 2011, the ratio jumped to 73.4%. If we further compare the frequency of multiple (≥ 3) opinions, we shall find, from 1994 to 2003, only 31 out of 200 interpretations (15.5%) had three or more Grand Justices issuing individual opinions. From 2003 to 2011, 58 out of 124 interpretations (46.8%) had three or more Grand Justices issuing individual opinions. In 12 interpretations (nearly 10%), there were at least eight (more than half) Grand Justices issuing individual opinions. In a legal culture that has been heavily influenced by European style of constitutional court and valued the unity of court as a whole, this phenomenon is noteworthy. The diversity and intensity of individual opinions issued by Grand Justices should be an important point of reference to analyze the degree of internal convergence or divergence in the decisions of CC.

<Table 4> Frequency of Grand Justices Issuing Individual Opinions in
1994-2003 and 2003-2011

No of Justices Issuing Individual Opinions	No of Interpretations with Individual Opinions	
	1994-2003 (#367-566)	2003-2011(#567-690)
1	50	12
2	20	21
3	10	18
4	6	7
5	4	9
6	3	8
7	7	4
8	0	8
9	1	2
10	0	1
11	0	1
Total	101	91
Percentage of Interpretations with Individual Opinions	50.5% (101/200)	73.4% (91/124)

Measured by either the total number or frequency of Grand Justices issuing individual opinions, it should be safe to conclude that the CC of 2003-2011 is obviously more active and divided than the CC of 1994-2003. Moreover, after 2003, those academics-turned-Justices were much more active and aggressive in expressing their individual opinions than their colleagues of career-judge background.

There were many factors contributing to such differences. An obvious element has been the number of Grand Justices being formerly public law scholars. Among the academia group, those formerly public law scholars have emerged as the leading voices. As Table 3 above indicates, the overall contribution, in terms of number, by the group of formerly career judges has remained almost unchanged from 1985 to 2011. On the contrary, the total number of opinions issued by those formerly non-public law scholars took a quantum jump after 1994 (from 27 to 94), but remained about the same before and after 2003 (94 v. 93). The largest increase came from the group of formerly public law scholars. The total number of their opinions increased from trivial 14 (1985-1994) and 27 (1994-2003) to noticeable 128 (2003-2011).

4.4. Other Factors Leading to the Divergence of CC

The factor of public law background alone could not fully explain the rapid increase of individual opinions after 2003. As Table 3 above indicates, the number of Grand Justices with the public law academic background was four (1994-2003) and five (2003-2011),²⁸⁾ respectively. However, the previous group of four issued only 27 individual opinions in nine years, while the latter group of five issued a total of 128 in eight years, as many as 4.7 times. There must be other reasons than the sheer number of such Justices.

²⁸⁾ To be more accurate, the number of Grand Justices being formerly public law scholars has varied since 2003. From October 2003 to September 2007, there were five such Justices out of 15. From October 2007 to October 2008, there were only three among a total of 11 Grand Justices. From November 2008 to October 2009, there were six such Justices out of a total of 15 Grand Justices. From November 2009 to September 2011, such number increased to seven among 15 Grand Justices.

One main reason was related to the age and generation of Grand Justices. Before 2003, most of Grand Justices were appointed in their 60s, approaching the twilight of their career. Among the five Grand Justices with public law background appointed in 2003, two were around 50 and still in the prime time of their academic career.²⁹⁾ Relatively young in age and active in research, these two Grand Justices turned out to produce a lion share of individual opinions issued by those formerly public law scholars. Moreover, the younger generation of public law scholars tends to be more outspoken than their teacher-generation. Unlike the older generation, these younger public law scholars witnessed and even participated in the process of Taiwan's democratization during their early age of academic career. They had a much better opportunity to develop a freer and less-tamed mind. On the contrary, the older generation often maintained a quieter style during adjudication, partly as a result of being disciplined under the authoritarian rule for decades.³⁰⁾

The second factor was associated with the ideological spectrum of Grand Justices after 2003. As stated above, the CC of 2003 consisted of a more balanced list of 15 Grand Justices in terms of political ideologies. The then President Chen and his DPP party did not wield a majority of seats in the LY. So he had to nominate 15 candidates representing a wide spectrum of political ideologies and legal backgrounds. He did. Not surprisingly, this balanced composition of CC eventually led to a more divided court, as indicated by the rapid increase of individual opinions.

A third factor had to do with Taiwan's political changes in the first decade of 21st century. In May 2000, the first party turnover in history occurred in Taiwan. Through May 2008, Taiwan was often caught in a tense deadlock of divided

²⁹⁾ Justice Tzu-Yi Lin and Justice Tzong-Li Hsu were 50 and 49 years old, respectively, upon taking office in October 2003.

³⁰⁾ A similar reason should explain the three Justices of non-public law academic background of 2003-2011 produced nearly as many individual opinions (93) as that (94) by the five Justices of similar background from 1994 to 2003. Justice Yu-Hsiu Hsu alone produced more than 80% of these 93 individual opinions. Being a very active criminal law professor, she was sworn in her office at the age of 49 and remained the youngest Grand Justice from 2003 to 2011.

government. Many thorny constitutional issues arising from political fights between the DPP-executive and KMT-legislative camps were brought before the CC by the LY minority or the executive branch, in order to counter the LY majority. Generally speaking, such highly political/constitutional issues often provoked heated debate among Grand Justices, resulting in fewer unanimous interpretations and more individual opinions.

The fourth factor is related to the development of constitutional doctrines concerning the rights cases by the CC itself. Here those formerly public law academics played a significant role again. On the cases concerning rights, Taiwan's CC has applied the proportionality principle as the main standard to scrutiny the constitutionality of laws since the mid-1990s. After 2003, Taiwan's CC began to apply the double standard, two-track theory (content-based v. content-neutral restrictions), two-level theory (high value v. low/no value speech), and three-tier standards of review (strict scrutiny, intermediate scrutiny and rationality review) to cases involving free speech, equal protection and other constitutional rights. In recent Interpretations, the CC went further to integrate both German test of proportionality principle and the U.S. theories of three-tier standards of review. In other words, Taiwan's CC has gradually adopt the model of "one (proportionality) principle, three standards (of review)" to determine the constitutionality of laws infringing constitutional rights.³¹⁾ In practice, the choice and application of an appropriate standard of review in a pending case often became the focus of debate. Quite a substantial number of individual opinions were devoted to this issue. On this matter, those Grand Justices of academics background, particularly of formerly public law scholars, have been the leading voices shaping the theory of standards of review.

³¹⁾ For a detailed analysis, see Jau-Yuan Hwang, *Development of Standards of Review by the Constitutional Court in Recent Years : Reception and Localization of Proportionality Principle* (in Mandarin), paper presented at the "6th Taiwan-Japan Symposium on Constitutional Study," at NTU College of Law, Taipei, Taiwan, on September 14, 2011.

4.5. Overall Performance of the CC after 2003

In terms of structure and composition, the year of 2003 marked a new watershed in the history of Taiwan's CC. The CC of 2003-2011 has been the most active and aggressive court in striking down laws and regulations. In nearly half of its interpretations (61 out of 124), it declared laws in question unconstitutional. This has been the highest percentage of unconstitutional declarations ever made by Taiwan's CC. It has been the most divided court in that this court issues the most individual opinions, averaging twice as many as that produced by any of its predecessors. Its members were appointed under the new law, which intended to diminish the political manipulation. Unfortunately, the appointment process of its members since 2007 has been the most partisan one. Although this court was appointed under a new law (constitutional amendment) intended to transform its structure, the above performance could be hardly attributed to this new law. It was mainly the Justices themselves who made all the differences.

5. Concluding Remarks

During its sixty-plus years, Taiwan's CC has transformed from an instrument of authoritarianism to an active and divided court. Before the 1980s, the then Council of Grand Justices was an institution hardly worthy of respect. In the 1980s, it won the legal battles against both Supreme Court and Administrative Court of final instance and successfully established itself as the highest authority on legal interpretations involving constitution. In the 1990s, the jurisdictions of Taiwan's CC were significantly expanded. As a result, it gradually became the last hope of individual rights and sometimes the arbitrator of political disputes. Entering into the 21 century, Taiwan's CC continues to strengthen its role as right-protector. Nevertheless, it very often finds itself torn between increasing political confrontations among the Justices themselves as well as between the CC and the hostile political branches. In this light, the emergence of diverse individual opinions may be considered as a mirror of Taiwan's diversity and democracy.

A constitutional court is made to be the guardian of constitution, which is supposed to protect and implement the ideas of constitutionalism. Of the many ideas associated with constitutionalism, rule of law has been one of its core principles. However, given the open and abstract nature of constitutional texts, particularly the rights provisions, we should keep reminding ourselves that it is often the opinions of judges ultimately shaping the meanings of rule of law and constitutionalism. In this regard, Taiwan's CC is no exception.